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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1969

No. [redacted] 186

IOWA PUBLIC SERVICE COMPANY,
Petitioner,

vs.

IOWA STATE COMMERCE COMMISSION; DICK A. WITT, FRANK B. MEANS and BERNARD J. MARTIN, Chairman and Commissioners of the Iowa State Commerce Commission; ARNOLD E. ALDRICH; G. J. CHENEY; FLOYD E. DOMINY; STEWART L. UDALL; and the U. S. BUREAU OF RECLAMATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Counsel of Record: MARK W. PUTNEY,
1100 Des Moines Building,
Des Moines, Iowa 50309,

Of Counsel: J. F. KINNEY,
Iowa Public Service Company,
Sioux City, Iowa 51101,

GEO. F. DAVIS,
DEWIE J. GAUL,
750 Orpheum Electric Building,
Sioux City, Iowa 51101,

Counsel for Petitioner, Iowa Public Service Company.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement	4
Reasons for Granting the Writ	5
Conclusion	7
Appendix:	
Constitutional provisions and statutes	A-1
Opinion of United States Court of Appeals for the Eighth Circuit	A-4
Judgment of Court of Appeals	A-12

Statutes Cited.

28 U. S. C., § 1254 (1)	2
28 U. S. C., § 1442	4, 6
Constitution of the United States:	
Fourteenth Amendment	4
Code of Iowa, 1966:	
Section 490A.1	4
Section 490A.13	4
Section 490A.17	4
Section 490A.24	4

IN THE

SUPREME COURT OF THE UNITED STATES.

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IOWA PUBLIC SERVICE COMPANY,
Petitioner,

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IOWA STATE COMMERCE COMMISSION; DICK A. WITT, FRANK B. MEANS and BERNARD J. MARTIN, Chairman and Commissioners of the Iowa State Commerce Commission; ARNOLD E. ALDRICH; G. J. CHENEY; FLOYD E. DOMINY; STEWART L. UDALL; and the U. S. BUREAU OF RECLAMATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit dated and entered in the above case on March 5, 1969.

OPINIONS BELOW.

The opinions of the District Court for the Southern District of Iowa are not reported. They are contained in the Record at pages 31 and 34.

The opinion of the Court of Appeals for the Eighth Circuit (Appendix page A-4 infra) is not as yet reported.

The order of the Iowa State Commerce Commission is not reported and is contained in the Record at page 6.

JURISDICTION.

The judgment of the Court of Appeals for the Eighth Circuit was dated and entered March 5, 1969 (Appendix page A-12 infra), and copy thereof is appended to this petition in the Appendix at pp. A-4 to A-11. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

The petitioner is a public utility which for many years served certain towns in Iowa with electric service, under franchise and pursuant to rates on file with the appropriate regulatory agencies. Certain of the respondents in July, 1966 offered to serve said towns with electricity, despite an Iowa law designed to prevent such "raiding". Petitioner filed a complaint with the Iowa State Commerce Commission, asking that said Commission find that the action of said respondents was in violation of law and that they be ordered to cease and desist their illegal actions, or that in the alternative, the towns involved, which are public utilities subject to the jurisdiction of the Commerce Commission, cease and desist their actions. The Commerce Commission notified the persons complained against, and a letter was written the Commission on their behalf by a deputy solicitor of the Interior Department. The petitioner requested a hearing, but no hearing was afforded the parties and the complaint was dismissed. The petitioner filed an appeal pursuant to Iowa law, alleging the dismissal was arbitrary and capricious and a

denial of due process. The matter was removed from state court to the Federal District Court, which sustained a motion to dismiss. The Court of Appeals affirmed. The questions presented are:

1. Does the denial of a hearing to petitioner on its complaint constitute a denial of due process, where the applicable law provides that a hearing shall be had and that evidence may be presented only before the administrative agency?

2. Whether the cause was properly retained in Federal Court even though no relief was asked as against the removing parties.

3. Whether the mere fact that a person is a Federal official precludes any hearing on a complaint against them, regardless of the fact that they are alleged to have violated a state law and no justification or excuse for such violation is pleaded.

4. Whether a party who is harmed by the action of a person who is a Federal official is barred by the Supremacy Clause or by the principle of sovereign immunity from having a hearing on a complaint against such a person.

5. Whether the mere fact that federal officials are involved precludes any hearing on a complaint against them where the complaint suggests an alternative means of relief is open to the State Commission by the exercise of admitted jurisdiction over those other than the federal officials.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The pertinent portions of the 14th Amendment to the Constitution of the United States, 28 U. S. C., § 1442, and Sections 490A.1, 490A.13, 490A.17 and 490A.24 of the 1966 Code of Iowa (II 1966 Code of Iowa at pages 1965, 1968, 1969, 1970) are set forth in the Appendix at pp. A-1 to A-4.

STATEMENT OF THE CASE.

The petitioner in July of 1966 learned that certain of the respondents offered to serve the towns of Lake View, Wall Lake, Breda, and Hinton, Iowa, with electric service despite the fact that petitioner had contracts with each town for such service. Iowa law provides that no public utility shall offer or furnish electric service to any consumer already receiving electric service from another public utility. Sec. 490A.24 of the 1966 Code of Iowa. Pursuant to the procedure prescribed by Iowa law petitioner filed a complaint with the Iowa State Commerce Commission. Without any motion or pleading by the persons complained against and without any hearing of any kind, the Iowa State Commerce Commission dismissed the complaint. The Iowa law provides for appeal to state court from any arbitrary or capricious action by said Commission, and such an appeal was perfected asking only that the order dismissing the complaint be vacated and a hearing be afforded petitioner by said Commission.

Thereupon the cause was removed by the Federal officials to Federal Court. The removing parties asserted that the cause was removable under 28 U. S. C., Section 1442 (a) (1). Petitioner moved to remand, pointing out that removal was not warranted by 28 U. S. C., Section

1442, since no relief was being asked against the parties removing the action, and no civil action was pending against them. The motion to remand was overruled.

The Federal District Court sustained a motion to dismiss, holding that no hearing was necessary. The Court of Appeals affirmed on the basis of Federal Supremacy and that the action was an unconsented-to suit against the United States.

REASONS FOR GRANTING THE WRIT.

The decision below should be reviewed because the result of the proceedings so far has been to deny to petitioner a hearing on an allegation of serious harm to petitioner caused by certain Federal officials.

The petitioner alleged in the complaint filed that the respondents had violated state law, and this allegation was not denied, the issues never having been made up. The state agency never required the respondent officials even to assert that they were acting lawfully, or to assert that if they were acting contrary to state law they were justified by some overriding law. The result of the proceedings up to this point is that because persons are Federal officials they ipso facto are authorized to commit otherwise illegal acts, for the petitioner has never been afforded a hearing, nor have the officials involved so much as pleaded any justification for their actions. The Court of Appeals in its opinion refers to the Flood Control Act of 1944—but it was never even pleaded that said Act is the authority under which said officials purported to act, and no opportunity was ever afforded the petitioner to develop the facts in this matter. The action in this case was aborted by dismissal before the issues were even made up, and the discussion by the Court of Appeals of the Supremacy Clause is at least premature—because there is nothing in the record to even show that

the actions involved are authorized by any congressional Act. So we do not even reach the question of a conflict between a State law and a Federal law—the defendants have never pleaded anything.

The finding that, even though there was no motion or answer filed by the defendants and no hearing, the petitioner was afforded due process rests on the unpleaded assumption that the defendant officials were acting pursuant to authority of some superior law. Since no pleading or motion was ever filed before the Iowa State Commerce Commission, there is nothing to show that any Federal law authorizes the complained-of actions.

The basic issue in this cause, in its present posture, is: Is a Federal official, by reason of the fact that he is a Federal official, automatically not required to answer for his acts to a State agency? Is he not at least required to show his acts are pursuant to some valid law? If such a course had been followed, the petitioner would have been afforded an opportunity to deny that the law which it is claimed authorized the action was applicable, or to show that the law was invalid. But the procedure followed by the lower courts was arbitrary and a denial of due process.

Additionally, the courts below misinterpreted the removal provisions of 28 U. S. C., § 1442, which requires that before a Federal official can remove an action to Federal Court an action be pending against him. While the Federal officials were named as defendants, the only relief asked in the petition was as against the Iowa State Commerce Commission: that it afford petitioner a hearing on its complaint as provided by law.

The result reached by the lower courts, and the manner of reaching it, represents a substantial departure from the accepted and usual course of judicial proceedings which requires this Court's supervision.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Counsel of Record:

.....

MARK W. PUTNEY
1100 Des Moines Building
Des Moines, Iowa 50309
Counsel for Petitioner,
Iowa Public Service Company

Of Counsel:

J. F. KINNEY
Iowa Public Service Company
Sioux City, Iowa 51101
Counsel for Petitioner,
Iowa Public Service Company

GEORGE F. DAVIS
DEWIE J. GAUL
750 Orpheum Electric Building
Sioux City, Iowa 51101
Counsel for Petitioner
Iowa Public Service Company

APPENDIX.

APPENDIX.

CONSTITUTIONAL PROVISIONS AND STATUTES.

Amendment XIV to the U. S. Constitution:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

28 U. S. C. A. 1442 (a)

"A civil action . . . commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

Chapter 490A of the 1966 Code of Iowa:

490A.1 "The Iowa state commerce commission shall regulate the rates and services of public utilities to the extent and in the manner hereinafter provided.

As used in this chapter, 'public utility' shall include any person, partnership, business, association, or corporation, domestic or foreign, owning or operating any facilities for:

1. Furnishing gas by piped distribution system or electricity to the public for compensation . . ."

490A.13 "Any party to any proceeding before the commission who is aggrieved by an order therein

may take an appeal by serving a notice of appeal upon the adverse party or parties and the commission and by filing said notice of appeal with the clerk of the district court of any county wherein the order of the commission or some part thereof is to take effect."

490A.16 "No new or additional evidence shall be introduced in the district court, but the case shall be determined by the court without a jury upon the record and evidence transferred; provided, however, that if any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such evidence is material and competent and that it could not have been offered before the commission or that such party was by the commission denied an opportunity to adduce it, the court shall order such evidence to be taken before the commission forthwith and shall stay further proceedings in the appeal pending return to the court of a record of such evidence."

490A.17 "The court may dismiss the appeal, modify or vacate the order complained of in whole or in part, or remand the matter to the commission for such further proceedings as justice may require. The court shall have jurisdiction to compel commission action unlawfully withheld or unreasonably delayed and the court shall have the power to set aside the commission action, findings and conclusions found to be:

1. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

2. Contrary to constitutional right, power, privilege or immunity.

3. In excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

4. Unsupported by substantial evidence in view of the entire record as submitted."

490A.24 "No public utility shall construct or extend facilities or furnish or offer to furnish electric service to the point of delivery to any consumer already receiving electric service from another public utility. No public utility shall construct or extend facilities or furnish electric service to a prospective customer not presently being served unless its existing service facilities are nearer the proposed point of delivery than the service facilities of any other utility. Notwithstanding the foregoing provisions of this section, any public utility may extend electric service and transmission lines to its own utility property and facilities or to another public utility for resale, or in case the public utility closest to or presently serving the delivery point consents thereto in writing or the commission after notice and hearing, and due consideration of the preference of the consumer, finds that service from a utility other than the closest utility is in the public interest."

OPINION.

United States Court of Appeals
For the Eighth Circuit.

No. 19,281.

Iowa Public Service Company,
Appellant,

v.

Iowa State Commerce Commission; Dick A. Witt, Frank B. Means and Bernard J. Martin, Chairman and Commissioners of the Iowa State Commerce Commission; Arnold E. Aldrich; G. J. Cheney; Floyd E. Dominy; Stewart L. Udall; and the U. S. Bureau of Reclamation,
Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

[March 5, 1969.]

Before Gibson and Lay, Circuit Judges, and Harper, Chief District Judge.

Gibson, Circuit Judge.

The plaintiff, Iowa Public Service Company (hereinafter "Company"), sought to restrain the United States government acting through its employees and agents from disposing of electrical power, generated at federal hydro-

electric installations constructed as part of a flood control project, to certain Iowa municipalities. It filed a complaint with the Iowa State Commerce Commission (hereinafter "Iowa Commission") alleging the proposed sale of electric power to certain municipalities being served by the Company to be in violation of Iowa law. The Company viewed the federal officers and agents[1] as a public utility subject to the jurisdiction of the Iowa Commission.

The Iowa Commission investigated and processed the complaint but did not afford the Company a hearing. Its Order of February 6, 1967 made specific findings of fact and conclusions of law fully disposing of the Company's contentions and dismissed the complaint.[2]

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[1] The federal officers and agency listed as defendants are: Stewart L. Udall, Secretary of the Interior; Floyd E. Dominy, Commissioner of the Bureau of Reclamation; Arnold E. Aldrich, Regional Director of the Bureau; G. J. Cheney, Assistant Regional Director; and the U. S. Bureau of Reclamation.

[2] The Iowa Commission Order reads:

"Now, this matter comes to the attention of this Commission on the complaint filed by Iowa Public Service Company on October 11, 1966, a letter received from the United States Department of Interior filed December 7, 1966, and a letter Reply of Complainant Company filed December 19, 1966, and the Commission being fully advised in the premises finds:

"1. That the Respondent, United States Bureau of Reclamation, is not a public utility as defined by Sec. 490A.1, Code of Iowa, 1966.

"2. That the acts of the Respondents complained of are authorized by the Constitution and Laws of the United States and are outside the regulatory jurisdiction of this Commission.

"3. That even if the United States Bureau of Reclamation were a public utility as defined by Sec. 490A.1, the extensions of service complained of are specifically exempted from the provisions of Sec. 490A.24, Code of Iowa, 1966.

"4. That the Commission is satisfied with respect to the Complaint.

"5. That there are no reasonable grounds for investigating said Complaint.

"It Is Therefore Ordered, that the Complaint be, and it is hereby dismissed."

The Company appealed the Order to the Iowa District Court, naming as defendants in addition to the federal officers and the U. S. Bureau of Reclamation, the Iowa Commission and its members. This cause was then removed to the United States District Court for the Southern District of Iowa pursuant to 28 U. S. C., § 1442 (a) (1).[3]

The United States District Court, the Honorable William C. Hanson, on motion, dismissed the complaint, upholding the action of the Iowa Commission and further finding no lack of due process, as contended by the Company, in the Iowa Commission proceedings.[4] A timely appeal was filed

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[3] 28 U. S. C. § 1442 (a) (1) reads:

"(a) A civil action * * * commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office * * *."

Note that when an action is brought against a federal officer as contemplated by 28 U. S. C., § 1442, the federal officer alone can remove without other defendants joining in the petition, and the entire case is removed to the federal court. *Allman v. Hanley*, 302 F. 2d 559, 562 (5 Cir. 1962); *Perez v. Rhiddlehoover*, 247 F. Supp. 65, 70 (E. D. La. 1965).

[4] Judge Hanson disposed of the due process issue with the following analysis:

"Where the Complaint in every aspect affords without question sufficient allegations when taken as true will support a finding, and where there has been sufficient participation for adjudication, there would seem to be no denial of due process. Certainly in this instance, with the record that was before the Commission, they could determine whether or not the respondent, U. S. Bureau of Reclamation, came within the definition of public utility under the Iowa Code as a matter of law. This they have done. They have further held that the acts of the respondent having been authorized by the Constitution and laws of the United States are outside their regulatory jurisdiction. And if the Commission should determine that this matter is beyond their jurisdiction, the Court has no doubt that there was sufficient admitted matter within the confines of the Complaint to make such a ruling."

by the Company. We affirm the decision of the District Court.

We have reviewed the Order of the Iowa Commission and the contentions of the Company, including lack of due process relative thereto, and are of the opinion that the findings, both factual and legal, of the Iowa Commission are entirely proper and that the procedure utilized was warranted under Iowa law and does not contravene federal constitutional requirements. We deem it unnecessary to discuss in detail the findings of the Iowa Commission and all of the contentions of the Company as we think this suit must be dismissed (and the judgment of the District Court affirmed) for at least two reasons.

1. The activities of the federal officials and the United States Bureau of Reclamation, which is merely an organizational division of the Department of the Interior, in offering to furnish hydroelectric power by virtue of congressional authority expressed in 43 U. S. C. 485 h (c)[5] and § 9 (c) of the Flood Control Act of 1944, 58 Stat. 887, 891,[6] are protected by the Supremacy Clause of the United States Constitution, Article VI, from interference by state regulation or control.

2. This is an uncontested suit against the federal government, a sovereign power.

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[5] The Federal Reclamation Laws are found at 43 U. S. C., § 371 *et seq.* and § 485h (c) provides in relevant part:

> "Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost * * *. [I]n said sales or leases preference shall be given to municipalities and other public corporations or agencies * * *."

[6] In pertinent part: "* * * [T]he reclamation and power developments to be undertaken by the Secretary of the Interior under said plans [plans approved for construction pursuant to the Act] shall be governed by the Federal Reclamation Laws * * *."

I.

A state does not possess the power to interfere with or to condition the operation of federal policies constitutionally mandated by Congress. The Supremacy Clause of Article VI of the United States Constitution reads:

> "'This Constitution, and the laws of the United States which shall be made in pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, *any thing in the Constitution or laws of any State to the Contrary notwithstanding.*" (Emphasis added.)

Chief Justice Marshall in *McCulloch v. Maryland,* 17 U. S. 316, 436 (1819) gave a literal interpretation of the Supremacy Clause:

> "* * * [T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared."

Later applications of the Supremacy Clause amplify its pervasiveness. *Nash v. Florida Industrial Commission,* 389 U. S. 235, 240 (1967), held unconstitutional a Florida statute which withheld unemployment insurance from discharged employees who filed unfair labor practice charges, stating: "[W]e follow the unbroken rule that has come down through the years", citing *McCulloch v. Maryland, supra.* Accord, *Leslie Miller, Inc. v. Arkansas,* 352 U. S. 187 (1956).

In *Public Utilities Commission of California v. United States,* 355 U. S. 534 (1958), the Court held a state statute requiring state Commission approval of negotiated intra-

state rates for shipment of personal property unconstitutional as applied to shipments of federal property. Under federal law procurement officers were authorized to negotiate reduced rates. Under California law the reduced rates could only be operative if the state Commission approved. The Court held the California provision must give way to federal law, again quoting *McCulloch v. Maryland,* at 544 of 355 U. S.:

> "'It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.'"

The Court further stated at 544 of 355 U. S.: "The conflict [between the federal policy of negotiated rates and the state policy of regulation of negotiated rates] seems to us to be as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve."

Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania, 318 U. S. 261 (1943) relied on by the Company is inapposite. There a state regulation set the minimum price at which private contractors could sell milk to the government. The Court noted that those who contract to furnish supplies or render services to the government are not governmental agencies and do not perform governmental functions, and held the state regulation "imposes no prohibition on the national government or its officers." 269-270 of 318 U. S.

The Company does not challenge the constitutional authority of Congress to pass the Flood Control Act of 1944 with its provision for the disposal of electrical energy. See, *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 330-340 (1936). The United States government in selling this electrical energy is free to do so without direction or control by state law or regulation.

II.

The principle of a sovereign's immunity from suit needs no elaboration. "The United States, as sovereign, is immune from suit, save as it consents to be sued." *United States v. Sherwood,* 312 U. S. 584, 586 (1941); *Konecny v. United States,* 388 F. 2d 59, 62 (8 Cir. 1967), and cases cited. The Company cites no statute authorizing the present action, and we find none.

The contention of the Company that it is not seeking to restrain the federal government but only federal officials is wholly lacking in substance. There is no claim that the federal defendants are acting beyond or in excess of their statutory authority. Where individual federal officials are sued, the test applied in determining whether the suit is directed against the sovereign is cogently set forth in *Larson, War Assets Administrator and Surplus Property Administrator v. Domestic and Foreign Commerce Corp.,* 337 U. S. 682, 688 (1949):

> "In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained."

And, in *Dugan v. Rank,* 372 U. S. 609, 620 (1963):

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land v. Dollar,* 330 U. S. 731, 738 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' *Larson v. Domestic & Foreign Corp., supra,* at 704; *Ex parte New York,* 256 U. S. 490, 502 (1921)."

And, in *Hawaii v. Gordon*, 373 U. S. 57, 58 (1963): "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter."

This is clearly a suit against the United States. Here the direct effect of the relief sought by the Company would be to restrain the United States, through the Bureau of Reclamation of the Department of the Interior, from carrying out the congressional mandate of the Flood Control Act of 1944 to sell power generated at federal projects to municipalities and also to deprive the United States of the proceeds that could be obtained for the power, proceeds intended by Congress to be applied to the cost of the projects.

The suit by the Company is an unconsented suit against the United States and, as such, is subject to dismissal; and the suit must be dismissed because the Supremacy Clause of the Constitution commands that federal law is paramount to state law and regulatory policies in regard to the congressionally mandated activity of the federal defendants.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT.

United States Court of Appeals
For the Eighth Circuit.

No. 19281 September Term, 1968.

Iowa Public Service Company,
Appellant,

vs.

Iowa State Commerce Commission, Dick A. Witt, Frank B. Means, and Bernard J. Martin, Chairman and Commissioners of the Iowa State Commerce Commission; Arnold E. Aldrick; G. J. Cheney; Floyd E. Dominy; Stewart L. Udall; and The U. S. Bureau of Reclamation,
Appellees.

Appeal From the United States District Court for the Southern District of Iowa.

This Cause came on to be heard on the record from the United States District Court for the Southern District of Iowa and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

March 5, 1969

Costs taxed in favor of appellees, U. S. Bureau of Reclamation, et al:

Cost of printing brief of appellees $9.50

Total costs taxed $9.50

A true copy.

Attest:

Robert C. Tucker,
Clerk, U. S. Court of Appeals, 8th Circuit.

March 28th, 1969.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]

IOWA PUBLIC SERVICE COMPANY, *Petitioner,*

v.

IOWA STATE COMMERCE COMMISSION: DICK A. WITT, FRANK B. MEANS and BERNARD J. MARTIN, Chairman and Commissioners of the Iowa State Commerce Commission; ARNOLD E. ALDRICH, G. J. CHENEY, FLOYD E. DOMINY, STEWART L. UDALL; and the U. S. BUREAU OF RECLAMATION, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Brief in Opposition for Respondents, Iowa State Commerce Commission: Dick A. Witt, Frank B. Means and Bernard J. Martin, Chairman and Commissioners of the Iowa State Commerce Commission

LEO J. STEFFEN, JR.
Commerce Counsel
State Capitol
Des Moines, Iowa 50319
Attorney for Respondents Iowa State Commerce Commission and its Members.

June 30, 1969

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Argument	7
Conclusion	10
Appendix A	11

AUTHORITIES CITED

CASES:

Larson, War Assets Administrator and Surplus Property Administrator v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949) 8

Dugan v. *Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed. 2d 15 (1963) 8

Hawaii v. *Gordon*, 373 U.S. 57, 83 S.Ct. 1052, 10 L.Ed. 2d 191 (1963) 8

Iowa State Commerce Commission v. *Northern Natural Gas Company*, — Iowa —, 161 N.W. 2d 111 (1968) 8

CONSTITUTION:

United States Constitution, Article VI 2, 7, 11

STATUTES:

43 U.S.C., 485h (c) 2, 11

Flood Control Act of 1944, Section 9 (c), 58 Stat. 887, 891 2-3

Section 490A.1, Code of Iowa, 1966 .....2, 5, 7, 8

Section 490A.3, Code of Iowa, 1966 .....3, 9, 12

Section 490A.24, Code of Iowa, 1966 .....3, 5, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1470

IOWA PUBLIC SERVICE COMPANY, *Petitioner,*

v.

IOWA STATE COMMERCE COMMISSION: DICK A. WITT, FRANK B. MEANS and BERNARD J. MARTIN, Chairman and Commissioners of the Iowa State Commerce Commission; ARNOLD E. ALDRICH, G. J. CHENEY, FLOYD E. DOMINY, STEWART L. UDALL; and the U. S. BUREAU OF RECLAMATION, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Brief in Opposition for Respondents, Iowa State Commerce Commission: Dick A. Witt, Frank B. Means and Bernard J. Martin, Chairman and Commissioners of the Iowa State Commerce Commission

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. pp. A-4-A-11) is reported at 407 F. 2d 916.

The opinions of the United States District Court for the Southern District of Iowa are not reported or

printed in the Petition for Writ of Certiorari. They are contained in the Record at pages R-31 and R-34.

The order of the Iowa State Commerce Commission is not reported or printed in the Petition for Writ of Certiorari. It is printed in the Record at page 6.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 5, 1969 (Pet. App. p. A-12). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the dismissal of a complaint without hearing by a state regulatory agency constitutes a denial of due process when the agency has neither jurisdiction of the respondents to the complaint nor of the subject matter of the complaint.

2. Whether the activities of the United States Bureau of Reclamation and its officials in offering to furnish hydro-electric power are subject to control and regulation by a state regulatory agency.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portion of the Fourteenth Amendment to the Constitution of the United States and 28 U.S.C. Section 1442 and Sections 490A1, 490A.13, 490A.17 and 490A.24 of the 1966 Code of Iowa, which Petitioner considers involved are set forth in the Appendix to the Petition for Writ of Certiorari (pp. A-1-A-4).

The relevant portions of Article VI of the United States Constitution and 43 U.S.C. 485h(c). Section

9(c) of the Flood Control Act of 1944, 58 Stat. 887, 891, Section 490A.3, Code of Iowa, 1966, which these Respondents consider involved are set forth in Appendix A hereto (pp. 1, 2).

STATEMENT

1. Proceedings Before the Iowa State Commerce Commission

In October, 1966, Petitioner filed a complaint with the Iowa State Commerce Commission against the U. S. Government-Respondents, alleging, inter alia, that the U. S. Government-Respondents were public utilities as defined by Chapter 490A, Code of Iowa, 1966, subject to the regulatory jurisdiction of the Commission (R. pp. 1-2, 4); that the U. S. Government-Respondents had offered to supply, wholesale, electrical energy to meet the requirements of four Iowa incorporated communities which own and operate their own utility plants and provide electric service to ultimate consumers located in the communities (R. pp. 2, 5); and that the U. S. Government-Respondents offer to sell electric energy in wholesale quantities to the four communities for resale to ultimate consumers was in violation of Section 490A.24, Code of Iowa, 1966, (R. pp. 2, 4).

Petitioner requested that the Commission find that the U. S. Government-Respondents in offering to sell electrical energy to the four communities were in violation of the provisions of Section 490A.24, Code of Iowa, 1966, and that the Commission order the U. S. Government-Respondents to "cease and desist" such violation (R. pp. 5-6).

By letter dated December 5, 1966, (Sup. pp. 1-4) the United States Department of the Interior responded to the complaint contending that the U. S.

Government-Respondents and their activities complained of were non-jurisdictional to the Commission. By letter dated December 16, 1966, Petitioner replied (Sup. R. pp. 4-6).

By order dated February 6, 1967, the Commission dismissed the complaint. The Commission found that the U. S. Government-Respondents were not a public utility as defined by Iowa statute; that the activities complained of were authorized by Federal Constitution and statutes and outside its regulatory jurisdiction; that in any event the activities complained of were not prohibited by Iowa statutes; that there were no reasonable grounds for investigating the complaint (R. pp. 6-7).

2. Proceedings Before the United States District Court

In March, 1967, the Petitioner filed a notice of appeal and a petition in the District Court for Polk County, Iowa, seeking review of the Commission's order dismissing the complaint. Named as defendants were the Commission and its individual members and the U. S. Government-Respondents. The Petitioner contended that the Commission's actions with respect to the complaint were arbitrary and capricious and an abuse of discretion because no hearing was held; that the Commission Order was not in accordance with law and contrary to constitutional rights in violation of the Fourteenth Amendment to the United States Constitution and provisions of the Iowa Constitution; and that the Order was in excess of statutory authority. The Petitioner requested that the Commission Order be vacated and the matter remanded to the Commission for further proceedings (R. pp. 7-10). The Commission answered (R. p. 11).

On petition by the U. S. Government-Respondents, the proceeding was removed to the United States District Court for the Southern District of Iowa under 28 U.S.C. 1442(a)(1) (R. pp. 12-14). Upon removal to the United States District Court the U. S. Government-Respondents moved to dismiss the petition on the grounds that the U. S. Government-Respondents were not a public utility as defined by Section 490A.1, Code of Iowa, 1966; that even if the U. S. Government-Respondents were a utility, as defined, their activity complained of is permitted by the express terms of Section 490A.24, Code of Iowa, 1966; and that in any event the action had not been consented to by the United States, which therefore had not waived its sovereign immunity to suit (R. pp. 14-21).

The Petitioner's motion to remand the cause to State Court (R. pp. 21-23) was denied (R. pp. 31-33).

The United States District Court found, after hearing, "that there are not adjudicative facts in the complaint to precipitate trial and the Court firmly believes that there was sufficient matter submitted to the Commerce Commission by the complainant to permit the ruling made" (R. p. 38).

"The conduct, action and processing of this matter, and the findings of the Commission and its Order" (R. p. 38) were affirmed by the District Court and it granted the motion of the U. S. Government-Respondents to dismiss (R. p. 39). Judgment thereon was entered February 2, 1968 (R. p. 40).

3. The Court of Appeals' Affirmance of the District Court and Commission Orders

Petitioner filed a timely Notice of Appeal from the Judgment of the District Court of February 2, 1968, with the United States Court of Appeals for the Eighth Circuit (R. p. 40).

The Court of Appeals on March 5, 1969, in a unanimous opinion, affirmed the District Court's dismissal of the suit for at least two reasons:

> "1. The activities of the federal officials and the United States Bureau of Reclamation, which is merely an organizational division of the Department of the Interior, in offering to furnish hydroelectric power by virtue of congressional authority expressed in 43 U.S.C. 485 h(c) and § 9(c) of the Flood Control Act of 1944, 58 Stat. 887, 891, are protected by the Supremacy Clause of the United States Constitution, Article VI, from interference by state regulation or control.
>
> 2. This is an uncontested (Sic) suit against the federal government, a sovereign power" (footnotes omitted) (Pet. p. A-7). The Court of Appeals also observed that it was "of the opinion that the findings, both factual and legal, of the Iowa Commission are entirely proper and that the procedure utilized was warranted under Iowa law and does not contravene federal constitutional requirements". (Pet. p. A-7).

The Court of Appeals noted that Petitioner did not "challenge the constitutional authority of Congress to pass the Flood Control Act of 1944 with its provisions for the disposal of electrical energy. (citing case). The United States Government in selling this electrical energy is free to do so without direction or control by state law or regulation". (Pet. p. A-9).

The Court of Appeals also noted that Petitioner's contention "that it is not seeking to restrain the federal government but only federal officials is wholly lacking in substance. There is no claim that the federal defendants are acting beyond or in excess of their statutory authority", (Pet. p. A-10) and that "this is clearly a suit against the United States". (Pet. p. A-11).

The Court of Appeals accordingly entered its judgment on March 5, 1969, affirming the District Court (Pet. p. A-12).

ARGUMENT

1. Assuming *arguendo* that the United States has consented to the maintenance of the action and that the Supremacy Clause of the United States Constitution, Article VI, does not prohibit the State of Iowa from regulating the sales of power in question, as the District Court noted (R. p. 37):

> "It must be perfectly obvious that if the U. S. Bureau of Reclamation and its officers are not a public utility under the provisions of Chapter 490A of the 1966 Code, then and in that event the petition must fail."

The Commission-Respondents finding that as a matter of law the U. S. Bureau of Reclamation was not a public utility as defined by the Iowa statute was correct. Section 490A.1, Code of Iowa, 1966, in part, defines a "public utility" as including "any person, partnership, business, association, or corporation, domestic or foreign, owning or operating any facilities for:

1. Furnishing electricity to the public for compensation . . ."

The U. S. Bureau of Reclamation, of course, is not a "person, partnership, business, association, or corpora-

tion" so the Petitioner attempted to create and confer jurisdiction on the Commission by naming as respondents to the complaint filed with the Commission individual federal officials who were responsible for the operations of the Bureau. The attempted divorce of the individuals from the Bureau "is wholly lacking in substance" (Pet. p. A-10). *Larson, War Assets Administrator and Surplus Property Administrator* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 69 S. Ct. 1457, 93 L. ed. 1628, (1949); *Dugan* v. *Rank*, 372 U.S. 609, 83 S. Ct. 999, 10 L. ed. 2d 15, (1963). *Hawaii* v. *Gordon*, 373 U.S. 57, 83 S. Ct. 1052, 10 L. ed. 2d 191, (1963). Nor can the Petitioner successfully argue that the contemplated wholesale sales by the Bureau constitute furnishing electricity to the public for compensation within the meaning of the Iowa statute. See *Iowa State Commerce Commission* v. *Northern Natural Gas Company*, ... Iowa ..., 161 N.W. 2d 111 (1968).

2. The Commission was not acting in a vacuum as Petitioner implies in its reasons for granting the Writ. The complaint filed with the Commission was forwarded to the U. S. Respondents, they in turn commuicated with the Commission setting forth their position, and Petitioner replied. Contrary to Petitioners' assertions the issues were framed.

The U. S. Respondents in their correspondence pointed out that if the Bureau and its officers were held subject to Commission jurisdiction conflict with the provisions of Article VI of the Constitution of the United States would exist (Sup. R. p. 3). This conflict would inevitably result in a holding that the Iowa statute was unconstitutional. The existence of this conflict argues strongly against Commission jurisdiction

and further supports the Commission's disavowal of jurisdiction over the U. S. Government-Respondents since it must be presumed that the Iowa Legislature was aware of the conflict when it passed the statute defining public utilities and that it did not intend to indulge in a useless act.

3. Under the provisions of Section 490A.3, Code of Iowa, 1966, (Br. App. A. p. b) which sets forth the basic complaint procedure for public utility matters, the Commission-Respondents only have jurisdiction over complaints relating to the acts or omissions of public utilities and since the U. S. Government-Respondents are not a public utility, as has been shown, the complaint before the Commission could not, under any circumstances, have been maintained and it was properly dismissed.

4. The Commission found in the alternative that even if the U. S. Government-Respondents were a public utility under the Iowa statute that their acts complained of were exempt from regulation under the provisions of Section 490A.24, Code of Iowa, 1966 (R. p. 6) which Petitioner relied on in its complaint (R. p. 2).

Section 490A.24 (Pet. App. p. A-3) provides in part:

> "... Notwithstanding the foregoing provisions of this section, any public utility may extend electric service and transmission lines to another public utility for resale ..."

Petitioner conceded in its complaint to the Commission that the communities to which the U. S. Government-Respondents proposed to make the wholesale power sales were public utilities (R. pp. 2, 4-5). This being so the Commission acted properly when it made the finding and dismissed the complaint.

5. The Petitioner persists in the contention that the United States is not the primary party in this proceeding simply because it cannot succeed otherwise since it cannot show that the United States has consented to be sued. The Court of Appeals laid this ruse to rest when it noted "Here the direct effect of the relief sought by the Company would be to restrain the United States, through the Bureau of Reclamation of the Department of the Interior, from carrying out the congressional mandate of the Flood Control Act of 1944 to sell power generated at federal projects to municipalities and also to deprive the United States of the proceeds that could be obtained for the power, proceeds intended by congress to be applied to the cost of the projects". (Pet. App. p. A-11)

CONCLUSION

The Iowa Legislature did not, and indeed could not, authorize the Iowa State Commerce Commission to regulate the activities of the U. S. Government-Respondents.

The decision of the court below is correct. There is no conflict of decisions. No further review by this Court of the decision is, therefore, required. The petition for Writ of Certiorari should be denied.

Respectfully submitted,

LEO J. STEFFEN, JR.
Commerce Counsel
State Capitol
Des Moines, Iowa 50319
Attorney for Respondents Iowa State Commerce Commission and its Members.

June 30, 1969

APPENDIX A

Constitutional Provisions

Article VI, U. S. Constitution

"... This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding ..."

Federal Statutes

43 U.S. C.A. 485h (c)

"Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any propect or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper: Provided further, That in said sales or leases preference shall be given to municipalities and other public corporations or agencies ..."

Flood Control Act of 1944, Section 9 (c) 58 Stat. at 891:

"...: The power developments to be undertaken by the Secretary of the Interior under (the plans approved for construction pursuant to the Act) * * * shall be governed by the Federal Reclamation Laws ..."

State Statute

Chapter 490A, Code of Iowa, 1966, 490A.3:.

"... Whenever there is filed with the commission by any person or body politic, or filed by the commission upon its own motion, a written complaint requesting the commission to determine the reasonableness of the rates, charges, schedules, service, regulations, or anything done or omitted to be done by any public utility subject to this chapter, in contravention of the provisions thereof, such written complaint thus made shall be forwarded by the commission to such utility, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the commission. If such public utility shall not satisfy the commission with respect to the complaint within the time specified and there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to promptly initiate a formal proceeding. Such a formal proceeding may be initiated at any time by the commission on its own motion ..."

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No. 186

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In the Supreme Court of the United States

OCTOBER TERM, 1969

IOWA PUBLIC SERVICE COMPANY, PETITIONER

v.

IOWA STATE COMMERCE COMMISSION AND THE UNITED STATES BUREAU OF RECLAMATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF THE UNITED STATES BUREAU OF RECLAMATION AND THE OTHER FEDERAL RESPONDENTS

ERWIN N. GRISWOLD,
Solicitor General,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

MORTON HOLLANDER,
RAYMOND D. BATTOCCHI,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinions of the district court are unreported. The opinion of the court of appeals (Pet. App. 4-11) is reported at 407 F.2d 916.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1969. The petition for a writ of certio-

rari was filed on May 31, 1969. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's suit seeking to restrain the Bureau of Reclamation from selling electric power to certain Iowa municipalities was properly dismissed.

STATUTE INVOLVED

The "Federal Reclamation Laws" (43 U.S.C. 371, *et seq.*) provide, in pertinent part (43 U.S.C. 485h (c)):

> Any sale of electric power * * * shall be * * * at such rates as in [the Secretary of the Interior's] judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost * * *: *Provided* * * *, That in said sales * * * preference shall be given to municipalities and other public corporations or agencies; * * *.

STATEMENT OF THE CASE

Petitioner Iowa Public Service Company filed a complaint with the Iowa State Commerce Commission (hereinafter the "Commission") naming as defendants the United States Bureau of Reclamation, an agency of the Department of the Interior (hereinafter the "Bureau"), the Secretary of the Interior, and various officials of the Bureau. The complaint alleged that the Bureau, in arranging to dispose of electric power to certain Iowa municipalities, was acting in violation of Iowa law, and that the Bureau

was a "public utility," as defined in Section 490A.1, of the Iowa Code, which authorizes the Commission to "regulate the rates and services of public utilities."

The Bureau responded by letter to the Company's complaint, pointing out that the challenged sale of power to the municipalities had been undertaken by the federal defendants pursuant to duties imposed by the Constitution and statutes of the United States, specifically the Federal Reclamation Laws (43 U.S.C. 485h(c)), which accord a preference to municipalities in the sale of power generated at federal hydroelectric projects. The letter further requested the Commission to dismiss the complaint for, among other things, lack of jurisdiction.

Petitioner answered the Bureau's letter with its own letter. After receiving both letters, the Commission dismissed the complaint, giving as its reasons (see Pet. App. 5, n. 2):

> 1. That the Respondent, United States Bureau of Reclamation, is not a public utility as defined by Sec. 490A.1, Code of Iowa, 1966.
>
> 2. That the acts of the [federal defendants] * * * complained of are authorized by the Constitution and Laws of the United States and are outside the regulatory jurisdiction of this Commission.
>
> 3. That even if the United States Bureau of Reclamation were a public utility as defined by Sec. 490A.1, the extensions of service complained of are specifically exempted from the provisions of Sec. 490A.24, Code of Iowa, 1966.
>
> 4. That the Commission is satisfied with respect to the Complaint.

5. That there are no reasonable grounds for investigating said Complaint.

Review of the Commission's dismissal was sought by petitioner in an Iowa state court. Named as defendants were the Commission, its members, and the previously named federal defendants. On petition by the federal defendants, the case was removed to the United States District Court for the Southern District of Iowa, pursuant to 28 U.S.C. 1442(a)(1), as a suit against federal officials acting under "color of office" (see Pet. App. 6).

The district court denied petitioner's motion to remand the cause to the state court, and granted defendants' motion to dismiss the suit. On appeal the dismissal was upheld. The court of appeals rejected "the contentions of the Company, including lack of due process," and ruled that "the findings, both factual and legal, of the Iowa Commission are entirely proper and that the procedure utilized was warranted under Iowa law and does not contravene federal constitutional requirements" (Pet. App. 7). Moreover, the court noted, the suit must in any event be dismissed and the judgment below affirmed since the activities of the Bureau and respondent federal officials, in selling the hydro-electric power to Iowa municipalities, "are protected by the Supremacy Clause * * * from interference by state regulation or control," [1] and since

---

[1] See, *e.g.*, *Public Utilities Commission of California* v. *United States*, 355 U.S. 534; *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239.

"an unconsented suit against the federal government, a sovereign power," was involved[2] (*ibid.*).

ARGUMENT

Petitioner's suit seeks to enjoin an instrumentality of the federal government from selling electric power to certain Iowa municipalities. There can be no serious doubt that the suit was properly dismissed for the two fundamental reasons emphasized by the court below, *i.e.*, that such sales are protected by the Supremacy Clause and that the United States was immune from the instant suit. Indeed, petitioner does not—and, we submit, cannot—directly challenge the ruling below. Instead, it seeks to avoid the impact of that decision by contending that the Commission violated due process by refusing to grant it a hearing at which it could introduce evidence. That contention is without merit, and no conflict of decisions is even suggested. Thus, further review is not warranted.[3]

1. That the "due process" argument lacks merit is made clear by the fact that the Commission's decision was reached upon consideration of the complaint and the written submissions by both parties. Those documents on their face contain all the facts necessary to support the Commission's dismissal of the complaint. Accepting as true the complainant's allegation that

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[2] See, *e.g.*, *Hawaii* v. *Gordon*, 373 U.S. 57; *United States* v. *Sherwood*, 312 U.S. 584, 587.

[3] Even if an administrative procedural irregularity of due process proportions is assumed, petitioner's suit was nonetheless properly dismissed, at least as to the federal defendants, for the two fundamental reasons noted previously.

the Bureau was violating state law, the Commission needed no additional facts to justify its conclusion that the Bureau was not a "public utility" under Iowa law, and was thus without its regulatory jurisdiction. Moreover, petitioner was allowed to submit to the Commission in writing its reasons for opposing the dismissal of the complaint, and in fact did so. In these circumstances, there is no requirement that the state agency grant an evidentiary hearing to establish the existence of facts already assumed to be true. Cf. *Hannah* v. *Larche*, 363 U.S. 420.

Petitioner apparently contends, in addition, that the Commission's failure to grant an evidentiary hearing contravened state law. This contention, however, is controverted by express provisions of Iowa law. Thus, Section 490A.3 of the Iowa Code provides, in pertinent part:

> Whenever there is filed with the commission by any person or body politic * * * a written complaint requesting the commission to determine the reasonableness of * * * anything done or omitted to be done by any public utility * * * such written complaint thus made shall be forwarded by the commission to such public utility, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the commission. If such public utility shall not satisfy the commission with respect to the complaint within the time specified and there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to promptly initiate a formal proceeding. * * *

This statute requires the Commission to hold a hearing only when the defendant does "not satisfy the commission" that there is no basis to the complaint; it contains nothing requiring a hearing when the Commission is satisfied, on the basis of the complaint and written submissions before it, that it lacks jurisdiction. Consequently, the contention that the Commission violated state law is without substance.

2. Petitioner's remaining point is equally untenable. It is inaccurate to maintain that the suit sought no relief against the federal government or its officials, and hence was improperly removed to a federal court. As the court of appeals stated, petitioner's action "sought to restrain the United States government acting through its employees and agents from disposing of electrical power" (Pet. App. 4). It is obvious, therefore, that relief was sought against the federal government and its officials. In fact, that that was the basic purpose of petitioner's suit was acknowledged by its naming the Bureau and the federal officials as defendants.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

MORTON HOLLANDER,
RAYMOND D. BATTOCCHI,
Attorneys.

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